HAJI MOHAMED ZEBIDI BIN HAJI SALLEH & ANOR.

v.

DATO' HAJI ABDULLAH BIN MOHD. HUSSIN & 3 ORS. AND DEWAN PERNIAGAAN DAN PERUSAHAAN MELAYU MALAYSIA (INTERVENOR)

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CIVIL SUIT NO. 22-10 OF 1992]
14 JULY 1993

PRACTICE AND PROCEDURE: Consent - Jurisdiction of Court - Whether a party to a settlement has the right to apply to vary a Court order - Estoppel - Whether plaintiffs estopped from challenging validity of consent order.

In this case, both the plaintiffs and the defendants were parties to a settlement, the terms of which were set out in the consent order dated 9 January 1993. The issue was whether a party to a settlement has the right to apply to vary a consent order.

Held:

[1] The terms of the consent order undoubtedly formed part of the Court order which must be assumed to have been made with the consent of the plaintiffs and the defendants.

[2] There is no running away from the fact that every point was considered by the plaintiffs and the defendants before they entered into the consent order. There was no error in expressing the intention of the Court when the consent order was drawn up. Everything was laid on the table. Consequently, the plaintiffs were estopped by conduct from seeking to have the consent order varied.

[Plaintiffs application to vary consent order dismissed with costs].

Cases referred to:

Purcell v. FC Trigell Ltd. & Anor. [1971] 1QB 358 ***(cit)***
Hudderfield Banking Co. v. Lister [1895] 2 Ch 273 AC ***(cit)***
Kurupaya v. Ramasamy Chetty & Anor. (15 SSLR3) ***(cit)***
Meenabal v. Tan Kee Chong [1934] MLJ 280 ***(cit)***
Attorney-General v. Tomline [1877-8] 7 Ch D 388 ***(foll)***
Ainsworth v. Wilding [1896] 1 Ch 673 ***(foll)***
Cristel v. Cristel [1951] 2 All ER 574 ***(foll)***
Abbott v. Abbott [1930] 47 TLR 207 ***(dist)***
Abuakwa v. Adanse [1957] 3 All ER 559 ***(foll)***
Yat Hung Investment Co. Ltd. v. Dao Heng Bank Ltd. [1975] AC 581 ***(foll)***

Other sources refered to:

Practice Note [1927] WN 290

For the plaintiffs - Hj. Asmuni Awi; M/s. Maxwell, Kenion, Cowdy and Jones.
For the defendants - Hj. Mohamed Asri bin Othman; M/s. Asri & Co.
For the intervenor - Abdul Aziz bin Abdul Wahab; M/s. Albar Zulkifly & Yap.

JUDGMENT

Haji Abdul Malik bin Haji Ishak JC:

The question which arises for decision revolves on the Court's jurisdiction to vary the Court order dated 9 January 1993. Precisely put, the question here is whether a party to a settlement has the right to apply to vary a consent order. I shall, in due course, refer to so much of the facts as may be necessary for the purpose of this judgment.

The plaintiffs and the defendants were parties to a settlement, the terms of which were set out in the consent order dated 9 January 1993. The settlement, *inter alia*, provided for:

(1) declaring the Annual General Meeting of the Perak Malay Chambers of Commerce held on 26 January 1992 null and void;
(2) all office bearers elected or appointed by the 26 January 1992 Annual General Meeting of the Perak Malay Chambers of Commerce be declared null and void;
(3) any action, decision and activity performed by the office bearers after 26 January 1992 be declared cancelled, invalid and of no effect;
(4) it was further ordered that:
    (a) the defendants, their workers and/or agents be restrained by an injunction to administer and/or to interfere with the affairs of the Perak Malay Chambers of Commerce till a fresh Annual General Meeting of the Perak Malay Chambers of Commerce be held;
    (b) that a new Annual General Meeting of Perak Malay Chambers of Commerce organised by the Malay Chambers of Commerce (Headquarters) be held

within 21 days hereof to substitute the 19th Annual General Meeting of the Perak Malay Chambers of Commerce;

(c) that the plaintiffs be given notices to attend the forthcoming Annual General Meeting of the Perak Malay Chambers of Commerce;

(d) that the list of memberships of the Perak Malay Chambers of Commerce be examined to ascertain its validity by the Malay Chambers of Commerce (Headquarters) and/or by any independent body so appointed by the Malay Chambers of Commerce (Headquarters) before the notice for the forthcoming Annual General Meeting of the Perak Malay Chambers of Commerce be distributed to its members in Perak;

(e) that, in the interim period, all affairs of the Perak Malay Chambers of Commerce be carried out and administered directly by the Malay Chambers of Commerce (Headquarters); and finally

(f) that the costs incurred be borne by the defendants.

Events subsequently proved that the consent order dated 9 January 1993 especially on the role of the Malay Chambers of Commerce (Headquarters) in drawing up the list of memberships of the Perak Malay Chambers of Commerce and opening its door to everyone, whether old or recently recruited, in its recruitment drive in Perak and inviting such members (not only the old but also the new recruits) to attend the 19th Annual General Meeting of the Perak Malay Chambers of Commerce scheduled on 6 June 1993, incurred the displeasure of the plaintiffs, who on 4 June 1993, obtained an *ex-parte* injunction to stop the proposed 6 June 1993 Annual General Meeting.

Now, the plaintiffs apply, though worded in a different form or under a guise, but in actual fact in amounts to nothing more than to vary the consent order dated the 9 January 1993, to the extent that it affected them, to be set aside.

The terms of the consent order undoubtedly formed part of the Court order which must be assumed to have been made with the consent of the plaintiffs and the defendants.

Haji Asmuni Awi, learned Counsel for the plaintiffs, argued that the Court had jurisdiction to vary the consent order relying on the passage in the judgment of Denning MR in *Purcell v. FC Trigell Ltd. & Anor.* [1971] 1QB 358 to the following effect:

> The plaintiff says that no appeal lies from an order made with the consent of the parties, except in circumstances in which a contract may be set aside or varied, such as mistake, misrepresentation, and so forth: and that this applies to interlocutory orders as well as to final orders. Mr. Hicks for the plaintiff relied in this regard on *Toder v. Sansam* [1775] 1 Bro. PC 468. I think that the plaintiff puts his case too high. I think that a party, who gets leave, can appeal from a consent order on wider grounds, at any rate in interlocutory matters ... The court has always a control over interlocutory orders. It may, in its discretion, vary or alter them even though made originally by consent.

Haji Mohamad Asri bin Othman, learned Counsel for the defendants, argued that a consent order which had been completed and acted upon can only be set aside on the ground of common mistake and in the present case there was no common mistake between the plaintiffs and the defendants. *Hudderfield Banking Co. v. Lister* [1895] 2 Ch. 273 CA was cited by the learned Counsel.

Encik Abdul Aziz bin Abdul Wahab, learned Counsel for the intervenor, founded his objection on the well-settled law that once an order or judgment pronounced by a Court has been drawn up and perfected, it cannot be altered or modified except as to correct errors in expressing the intention of the Court. This submission appears to be grounded on the "slip rule" as set out in O. 20 r. 11 of the Rules of the High Court 1980. It has been said that the operation of the slip rule is limited to certain cases in which there has been a clerical mistake or error arising from an accidental slips or omissions both by the officers of the Court and the parties. **In short, the error must be an error in expressing what the Court intended at the time when the order was made** *(Kurupaya v. Ramasamy Chetty & Anor.* [15 SSLR3] and *Meenambal v. Tan Kee Chong* [1934] MLJ 80).

In my judgment, the slip rule does not apply in the present case as there is no slip at all. But there is still hope for the plaintiff. They can, if they want to, circumvent the obstacle. It is apparent that the only way the consent order can be varied is for the plaintiffs to file a fresh action.

Attorney-General v. Tomline [1877-8] 7 Ch D 388 lays down the proposition that once a judgment by consent has been passed and entered, it cannot afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement. It is now settled that after a judgment has been passed and entered, even where it has been taken by consent and under a mistake, the Court cannot set it aside otherwise than in a fresh action brought for the purpose unless it falls under category (a) where there has been a clerical mistake or an error arising from an accidental slip or omission, or under category (b) where the judgment as drawn up does not correctly state what the Court actually decided and intended to decide, in either of which cases the application may be made by motion in the action (*Ainsworth v. Widing* [1896] 1 Ch 673).

It is pertinent to point out that the Tomlin order (see **Practice Note** [1927] W.N. 290) couched in the following terms: "And, the plaintiff and the defendant having agreed to the terms set forth in the schedule hereto, it is ordered that all further proceedings in this action be stayed, except for the purpose of carrying such terms into effect. Liberty to apply as to carrying such terms into effect" is not applicable to the present case and futhermore the words "liberty to apply" in an order, would *prima facie*, mean that when the order was drawn up its working out might involve matters on which it might be necessary to obtain a decision of the Court. Those words do not confer any right to ask the Court to vary the order (see *Cristel v. Cristel* [1951] 2 All ER 574). What more, in the present case, without the aid of the Tomlin order, the plaintiffs are not conferred with any right to ask the Court to vary the consent order unless they file a fresh action.

On the other end of the scale, there is the decision in *Abbott v. Abbott* [1930] 47 TLR 207, where it was held that the words "liberty to apply" did not make the Court order (maintenance order) a final order for on its true construction the parties contemplated and agreed that it can be varied if a change in financial circumstances warrants it. In the present case, the consent order that was sought to the varied was not a maintenance order, and consequently the need to file a fresh action became more real and acute.

On the question of estoppel, it was urged upon me that the plaintiffs were estopped from challenging the validity of the consent order. Lord Denning in the celebrated case *Abuakwa v. Adanse* [1957] 3 All ER 559 lays down the general rule on estoppel as follows:

> The general rule of law undoubtedly is that no person is to be adversely affected by a judgment in an action to which he was not a party, because of the injustice of deciding an issue against him in his absence; but this general rule admits of two exceptions. One exception is that a person who is in privity with the parties, a "privy" as he is called, is bound equally with the parties, in which case he is estopped by *res judicata*; the other is that a person may have so acted as to preclude himself from challenging the judgment, in which case he is estopped by his conduct.

Encik Abdul Aziz Wahab relied on estopped by conduct. He contends that the plaintiffs are estopped from seeking to have the consent order set aside.

The Privy Council in *Yat Hung Investment Co. Ltd v. Dao Heng Bank Ltd.* [1975] AC 581 elaborated further on the estoppel doctrine. This is what the Privy Council said:

> But there is a wider sense in which the doctrine may be applied to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The *locus classicus* of that aspect of *res judicata* is the judgment of Wigram VC in *Henderson v. Henderson* [1843] 3 Hare. 100;67 ER 313 where the judge say:
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> > ... where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstance) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation,

and which the parties, exercising reasonable diligence, might have brought forward at the time.

In my judgment, there is no running away from the fact that every point was considered by the plaintiffs and the defendants before they entered into the consent order. With reasonable diligence, the plaintiffs should forsee the obstacles ahead and come up with a good formula to settle the case once and for all. There was no error in expressing the intention of the Court when the consent order was drawn up. Everything was laid on the table. Consequently, the plaintiffs are now estopped by conduct from seeking to have the consent order varied.

However, in the course of the arguments, Haji Mohamed Asri relents and concedes that there was a common mistake between the parties especially in regard to the powers of the Malay Chambers of Commerce (Headquarters) as stated in the early part of this judgment, but he submits that the plaintiffs ought to file a fresh action.

Finally, Encik Abdul Aziz Wahab submits that the plaintiffs are barred from coming before the same Court as the Court is already *functus officio* when it has already made a final pronouncement on the rights of the parties appearing before it so as to bring all proceedings to an end. But this must, in my view, be distinguished from orders which are in the nature of directions which can be varied by the same Court as the Court is not *functus officio.* Clearly from the facts, both parties had settled the differences between them and had appointed the Malay Chambers of Commerce (Headquarters) to be their mediators in validating the list of membership of the Perak Malay Chambers of Commerce and giving them the mandate to organise a fresh 19th Annual General Meeting of the Perak Malay Chambers of Commerce, etc..

For the reason adumbrated above, I dismissed the plaintiffs' application (enclosure 45A) with costs.

HUA JOO DEVELOPMENT CO. SDN. BHD

v.

SURVEY DEVELOPMENT SERVICE

HIGH COURT, KUCHING
DATUK CHONG SIEW FAI J.
[CIVIL APPEAL NO. KG.13 OF 1992 (I)]
4 SEPTEMBER 1993

EVIDENCE: Adducing evidence on appeal - Principles involved - Whether the requirement of special grounds for the admission of further evidence applies in an appeal from a lower Court to the High Court.

At the commencement of the hearing of the appeal against the decision of the Sessions Court striking out the defence of the defendant, the plaintiff applied to admit in evidence a fresh affidavit to which application the defendant objected.

The question that arose was whether the conditions for the admission of further evidence on appeal laid down in *Ladd v. Marshall* [1954] 1 WLR 1489 applied in an appeal from a subordinate Court to the High Court and if so whether the plaintiff had satisfied the said conditions.

Held:

[1] The conditions for the admission of further evidence on appeal laid down by *Ladd v. Marshall (supra)* namely that it must be shown that the further evidence:

(a) could not have been obtained with reasonable diligence for use at the trial;
(b) is such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and
(c) must be apparently credible though it need not be incontrovertible,

applies in the case of an appeal from a subordinate Court to the High Court.

[2] It was not satisfactorily shown that the further evidence sought to be admitted could not have been obtained with reasonable diligence for the hearing in the lower Court. In the circumstances the plaintiff has failed to satisfy the conditions laid down in *Ladd v. Marshall* for the admission of further evidence and the affidavit which had already been filed with the